

# **EXHIBIT 1**

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8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
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11 **ARGENT CLASSIC CONVERTIBLE**  
12 **ARBITRAGE FUND L.P.,**  
13 **individually and on behalf of all others**  
14 **similarly situated,**

15 Plaintiff,

16 v.

17 **COUNTRYWIDE FINANCIAL**  
18 **CORPORATION, et al.,**

19 Defendants.  
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Case No. CV 07-07097 MRP (MANx)

**OMNIBUS ORDER Disposing of All  
Pending Motions in this Matter,  
Advising the Parties on Case  
Management, and Ordering the  
Parties to Meet and Confer**

24 This case is one of several related securities actions before this Court  
25 involving Countrywide Financial Corporation ("Countrywide")<sup>1</sup> and individuals  
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<sup>1</sup> On July 1, 2008, Countrywide completed a forward triangular merger into a subsidiary of Bank of America ("BofA") called Red Oak Merger Corporation ("Red Oak"). In the transaction, Countrywide shareholders received shares of BofA in exchange for their Countrywide shares. Red Oak was then renamed Countrywide Financial Corporation. Countrywide Fin. Corp., Form 10-Q (Aug. 11, 2008). The merger postdates the class period and the allegations in the complaint. Therefore, unless otherwise noted or required by context, "Countrywide," as used in this Order, refers to the entity as constituted before the merger.

1 associated with Countrywide. Countrywide and the individuals collectively are  
2 “Defendants.”

3 Plaintiff Argent Classic Convertible Arbitrage Fund L.P. (“Argent”) brings  
4 this action on behalf of purchasers of certain Countrywide convertible debentures  
5 (“the Debentures”) privately traded under SEC Rule 144A. 17 C.F.R. § 230.144A.  
6 The proposed class period runs from May 16, 2007 through November 21, 2007.  
7 Third Amended Compl. at 2.

8 In its November 28, 2007 order consolidating the Countrywide-related cases,  
9 the Court treated this case separately because the private placement context  
10 presents unique issues. Most important, the Court anticipated that the reliance  
11 element would require particular attention. Specifically, the Court was concerned  
12 about the private market’s implications for fraud on the market and actual reliance.  
13 Consol. Order 12-13.

14 The Court held that the Second Amended Complaint (“SAC”) did not  
15 adequately plead reliance. It was dismissed on November 13, 2008 with leave to  
16 amend. 2008 U.S. Dist. LEXIS 103148 (C.D. Cal.).

17 On December 3, 2008, Argent filed a Third Amended Complaint (“TAC”)—  
18 its fourth pleading attempt. Defendants submitted motions to dismiss. In addition,  
19 Countrywide submitted a motion to strike. Argent and Defendants filed requests  
20 for judicial notice and oppositions to some of those requests. This Order’s  
21 conclusion lists the title of each motion and its disposition.

22 This Order contains two substantive parts. The first part (“Legal  
23 Discussion”) resolves all pending motions. The second part (“Case Management”)  
24 orders the parties to meet and confer and provides some guidance for the parties’  
25 discussions.

I.

LEGAL DISCUSSION

A. Incorporation of *Pappas*' statements of law.

Incorporation by reference. The Court hereby adopts the statements of law made in the parallel public securities litigation ("*Pappas*") order of December 1, 2008. 588 F. Supp. 2d 1132. The present case contains different allegations and claims, though the Court acknowledges that the allegations and claims are similar in some respects to those in *Pappas*. The Court does not take notice of the *Pappas* allegations. It does, however, take notice of the SEC filings noticed in *Pappas*.

The parties to this case are advised not to construe the *Pappas* order more broadly than its text indicates. *See, e.g., infra* Section II (noting that Argent has taken part of *Pappas*' damages discussion out of context); Pl.'s Opp. to Individ. Defs.' Mtns. to Dismiss at 21 n.26, 26 (suggesting that this Court may have "found" facts in the *Pappas* order where it was actually noting that the parties had not yet disputed something, 588 F. Supp. 2d at 1199); Mozilo's Joinder at 2-3 (suggesting that the *Pappas* order's detailed analysis of alleged facts may have been misinterpreted by some third-party observers).<sup>2</sup>

Supplement to *Pappas*. The Ninth Circuit issued three relevant opinions

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<sup>2</sup> Recent Supreme Court case law requires balancing inferences and determining whether they amount to a "strong inference of scienter." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). The *Pappas* inferences were made, and the balancing undertaken, on the basis of alleged facts, construed in favor of the *Pappas* plaintiffs. *Pappas*, 588 F. Supp. 2d at 1185 (stating the law), 1192-93 (performing *Tellabs* balancing for the *Pappas* individual defendants on the *Pappas* allegations). A forthright legal analysis—undertaken for the benefit of all parties involved—is not "prejudging," as Mozilo suggests some outsiders may have interpreted *Pappas*. Mozilo's Joinder at 3. *See also Pappas* Status Conf. Tr. at 35:23-37:20 (Jan. 9, 2009) (counsel for Mozilo and the Court discussing Mozilo's Joinder and the Public Securities Litigation Reform Act- and Supreme Court-mandated analysis).

1 shortly before or after the *Pappas* order. The *Pappas* analysis is consistent with all  
2 three.

3 In *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156 (9th Cir. 2009), the Ninth  
4 Circuit reconciled its pre- and post-*Tellabs* cases in a manner that is entirely  
5 compatible with *Pappas*' reasoning. *Rubke* held that a post-*Tellabs* motion to  
6 dismiss analysis may be done in two steps: (1) apply pre-*Tellabs* case law that may  
7 suggest isolating allegations; and (2) if the complaint fails step one, proceed to a  
8 *Tellabs* "holistic" analysis. *Rubke*, 551 F.3d at 1165. In *Pappas*, the Court used  
9 pre-*Tellabs* case law to help guide, but not to limit, the *Tellabs* holistic analysis  
10 rather than performing two discrete steps. 588 F. Supp. 2d at 1185-86. This  
11 satisfies *Rubke*; a holistic analysis suffices, even if a complaint fails a pre-*Tellabs*  
12 analysis.

13 In *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981 (9th Cir. 2009), *as*  
14 *superseded and amended by* 2009 WL 311070 (9th Cir. Feb. 10, 2009), the Ninth  
15 Circuit reiterated that *Tellabs* requires a "holistic" analysis before dismissal and  
16 confirmed that the two-step inquiry described above may be used. 2009 WL  
17 311070, at \*1, \*5-6. The *Pappas* methodology accords with *Zucco*'s discussion of  
18 how various allegations may be construed for purposes of giving rise to a strong  
19 inference of scienter—including former employee allegations, accounting  
20 allegations, certifications in SEC filings, and insider sales. *Cf. Zucco* at 2009 WL  
21 311070, at \*9-22.

22 And in *Glazer Capital Mgmt., LP v. Magistri*, 549 F.3d 736 (9th Cir. 2008),  
23 released shortly before the *Pappas* order, the Ninth Circuit discussed the doctrines  
24 of "collective scienter" and "group pleading." *Glazer* discussed two collective  
25 scienter cases—one from the Second and one from the Seventh Circuit. *Id.* at 743.  
26 Collective scienter refers to a doctrine that allows a strong inference of scienter as  
27 to a corporation, even though the allegations fail to raise a strong inference as to  
28 any individual acting on the corporation's behalf. *Id.* The *Glazer* panel went on to

1 consider two other cases—from the Fifth and Eleventh Circuits—that rejected the  
2 related, but distinct, doctrine of “group pleading.” *Id.* at 743-44. Group pleading  
3 allows a strong inference of scienter as to individuals on the basis of allegations  
4 that corporate statements may be imputed to “individuals with direct involvement  
5 in the everyday business of the company.” *Id.* The *Glazer* panel left open the  
6 possibility of “collective scienter,” though *Glazer* evaluated a case where “group  
7 pleading” was more likely in issue and *Glazer* seemed to approve “group pleading”  
8 dicta from the Seventh Circuit. *See id.* at 744.

9 This Court does not express any opinion on either collective scienter or  
10 group pleading; neither doctrine is necessary to resolve the present motions. The  
11 Court therefore disregards ¶¶ 41-42 (alleging a “group pleading” theory).<sup>3</sup>

12 This Court follows the *Glazer* panel in holding that a complaint must “plead  
13 . . . facts that constitute strong circumstantial evidence of” scienter. *Id.* (internal  
14 citation and quotation omitted). *See Glazer*, 549 F.3d at 746-47 (reconciling this  
15 standard with the position-based inferences made in *Berson v. Applied Signal*  
16 *Tech., Inc.*, 527 F.3d 982 (9th Cir. 2008)). The relevant circumstances are those the  
17 complaint properly alleges, supplemented by facts appropriate for judicial notice.  
18 This is the same standard applied in *Pappas*. 588 F. Supp. 2d at 1186, 1189-91  
19 (following *Berson* and allowing position-based inferences in a manner fully  
20 compatible with *Glazer*). Similarly, signing a document filed with the SEC is a  
21 relevant circumstance, but should almost never be sufficient to raise a strong  
22 inference. *Glazer*, 549 F.3d at 747-48.<sup>4</sup>

23  
24 <sup>3</sup> These and all paragraph citations refer to the TAC.

25 <sup>4</sup> Countrywide submitted a notice of recent authority in *Sheldon Pittleman v. Impac*  
26 *Mortgage Holdings, Inc.*, 2009 WL 648983, 2009 U.S. Dist. LEXIS 18213 (C.D.  
27 Cal. Mar. 9, 2009). This Court monitors developments in mortgage-related  
28 securities cases, particularly those in this District. The Court notes (1) that *Impac*’s  
scienter analysis—as all scienter analyses—is closely bound to the allegations in  
that case; and (2) *Impac* overstates *Glazer* at 2009 WL 648983, at \*3, 2009 U.S.

1 **B. Brief statements regarding some of the present motions' arguments.**

2 **1. Evidentiary matters.**

3 Requests for judicial notice. The Court need not address the substance of the  
4 arguments requesting and opposing judicial notice. The TAC and documents filed  
5 with the SEC, which are indisputably subject to notice, resolve the present  
6 motions.

7 All requests for judicial notice are GRANTED only to the extent they  
8 request notice of documents filed with the SEC. All other requests for judicial  
9 notice are DENIED.

10 Nye affidavit. The affidavit lodged by Argent is improper and unnecessary  
11 at this stage. Countrywide's motion to strike the Nye affidavit is GRANTED.

12 Audio recording. Defendant McMurray asks this Court to take notice of an  
13 audio recording of an analyst conference call. Knowles Ex. A. The TAC contains  
14 excerpts from conference call transcripts. Those transcripts allegedly attribute  
15 statements to McMurray. McMurray argues that he is not the speaker in the  
16 recording and that the allegations and transcripts misattribute the statements to  
17 him.

18 The Court reviewed the audio recording and has determined that the  
19 recording is not subject to judicial notice. McMurray proffers the recording not for  
20 the truth of the matters asserted in it, but to have this Court take notice that  
21 McMurray is not the speaker on the recording. However, "[i]t takes more than an  
22 exception to the hearsay rule . . . to justify judicial notice." *Doss v. Clearwater*  
23 *Title Co.*, 551 F.3d 634 (7th Cir. 2008). To avoid converting McMurray's motion  
24 to dismiss into one for summary judgment, Fed. R. Civ. Proc. 12(d), the identity of  
25 the voice must "not [be] subject to reasonable dispute" and must either be

26  
27 Dist. LEXIS at \*9-10: *Glazer* actually rejects the black-letter rule for which *Impac*  
28 cites *Glazer*. 549 F.3d at 744 (stating that the black-letter rule quoted by *Impac*  
was an "overstate[ment]" of Ninth Circuit law).

1 generally known or “capable of accurate and ready determination by resort to  
2 sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 803(15).  
3 McMurray asks the Court to agree with the aural opinions of attorney-declarant  
4 Sean K. Knowles, not just for authentication but also for the opinion’s substance.  
5 Knowles Decl. at ¶¶ 3-4. *See* Fed. R. Evid. 901(b)(5) (lay opinion may be basis for  
6 voice authentication and identification). The identity of the voice in the recording  
7 and the accuracy of transcripts cited in the TAC may be reasonably questioned.

8 The Court declines McMurray’s invitation for an evidential inquiry at this  
9 stage, which would convert his motion to dismiss into a motion for summary  
10 judgment. The TAC adequately pleads that McMurray made the statements  
11 attributed to him.

12 The request to notice the audio recording is therefore DENIED. The audio  
13 recording attached to McMurray’s motion to dismiss is STRICKEN on the Court’s  
14 own motion.

## 15 **2. Motions to dismiss.**

16 Bank of America. Argent in the TAC added Defendant Bank of America “as  
17 the parent and successor-in-interest to Countrywide Financial Corporation.” ¶ 24.<sup>5</sup>

18 There are limited exceptions to the rule that a parent does not assume an  
19 acquired subsidiary’s preacquisition liabilities, even if the parent purchases assets  
20 of the subsidiary. Assuming that the broadest possible set of exceptions apply,  
21 Argent cannot hold BofA responsible for Countrywide’s liabilities unless: (1)  
22 BofA takes actions in bad faith to prejudice Countrywide’s creditors; (2) BofA  
23 expressly or impliedly assumes Countrywide liabilities; (3) there are facts that

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24  
25 <sup>5</sup> Argent also alleges that BofA took part in the Debentures’ syndication and  
26 “issued analysts reports” on Countrywide.” ¶ 25. Even if the allegations were  
27 legally relevant, many third parties took part in the Debentures’ syndication and  
28 had analysts covering Countrywide. BofA appears to have been no more  
significant in syndication and analyst coverage than any other third party,  
rendering these courses of conduct immaterial.



1 allows a court to look beyond the form of the acquisition and hold that there has  
2 been a *de facto* merger between BofA and Countrywide; or (4) BofA is a  
3 continuation of Countrywide. *Knapp v. N. Am. Rockwell*, 506 F.2d 361 (3d Cir.  
4 1974), *cert. denied* 421 U.S. 965 (1975).<sup>6</sup>

5 According to the TAC and judicially noticeable documents, Countrywide is  
6 still a subsidiary acquired in a triangular merger. *See supra* n.1; BofA, Form 10-K  
7 (Feb. 27, 2009). The Court notes that BofA has filed with the SEC statements to  
8 the effect that it has purchased, for consideration, “substantially all” Countrywide  
9 assets and has begun “integrat[ing]” some Countrywide operations or systems.  
10 BofA, Form 10-K (Feb. 27, 2009); BofA, Form 8-K (Nov. 10, 2008).

11 Nothing properly before the Court suggests that BofA has done more than  
12 expressly assume some liabilities in consideration of the acquisition (e.g.,  
13 indemnity and insurance agreements), BofA, Form S-4/A (May 28, 2008), or  
14 expressly assume liability on some debt in consideration of the asset purchase.  
15 BofA, Form 8-K (Nov. 10, 2008). The TAC, together with judicially noticeable  
16 documents, does not allege actions that have been taken in bad faith to prejudice  
17

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18  
19 <sup>6</sup> The Court assumes the broadest possible set of exceptions because the parties  
20 have not addressed which body of state law provides the rule of decision—without  
21 limitation, California, Delaware, North Carolina, and New York law are all be  
22 contenders. The parties have presumably failed to address the point because the  
23 TAC does not explain on which transactions its allegations are based, and therefore  
24 BofA has no notice as to which state’s law should govern.

25 At any rate, the Ninth Circuit has recognized that the four cited factors are based  
26 on state common law rules. *Atchison, Topeka, and Santa Fe Rwy. Co. v. Brown &*  
27 *Bryant, Inc.*, 159 F.3d 358 (9th Cir. 1998), *as amended* (Oct. 14, 1998) (discussing  
28 the same factors in the context of a federal ERISA claim and particularly focusing  
on the “continuation” exception). And none of the potentially relevant bodies of  
state law appear to have tests more inclusive than *Knapp*.

The Court expresses no opinion on the correct body of law because (1) given  
Argent’s pleading defects, any opinion would lack a basis in alleged facts; and (2)  
the result would be the same.

1 Countrywide's creditors—and the TAC certainly does not allege bad faith with the  
2 specificity required for alleging fraud. Nor does anything properly before the Court  
3 suggest that BofA has *de facto* merged with Countrywide. Finally, BofA is not a  
4 “continuation” of Countrywide. *See also In re McKesson HBOC, Inc. Sec. Litig.*,  
5 126 F. Supp. 2d 1248 (N.D. Cal. 2000) (rejecting similar arguments in a  
6 transaction structured the same way as the Countrywide acquisition).

7 BofA's motion to dismiss is therefore GRANTED. The TAC's allegations  
8 against BofA are DISMISSED without leave to amend.

9 Reliance—initial purchases pursuant to offering materials. Argent alleges  
10 that it “read and reviewed,” but not that it actually relied on, the Debentures'  
11 offering materials. ¶ 20. Argent's only proper reliance allegations with respect to  
12 the offering materials are actually a species of fraud on the market reliance: that  
13 the pricing of the Debentures' private offering was efficient for essentially the  
14 same reasons that Argent alleges the Debentures' aftermarket was efficient. *See*  
15 ¶¶ 48, 90, 706.<sup>7</sup>

16  
17 <sup>7</sup> Argent's alleged reliance on “financial terms” does not save its actual reliance  
18 allegations. ¶ 19. The “financial terms” are not alleged to be false; rather, such  
19 “terms” would include interest rates, par value, maturity date, external triggering  
20 events, and other contractual “facts” that are nowhere alleged to be false. To the  
21 extent that the “financial terms” refer to the Debentures' initial offering prices or  
22 the Debentures' convertibility features, this allegation merely rephrases the fraud  
23 on the market argument.

24 Argent further alleges that it actually relied on statements regarding  
25 “Countrywide's creditworthiness and liquidity.” *Id.* Even if such an allegation  
26 could survive Rule 9(b), and it does not, it is unclear whether the creditworthiness  
27 statements were representations about, for example, major agencies' credit ratings  
28 for Countrywide—in which case the statements are not alleged to be false. Nor is it  
clear whether liquidity-related statements were false when made. Indeed, the  
willingness of Argent and others to make large purchases of the equity-linked debt,  
the debt aspects of which Argent admits had “extremely low” interest rates, Argent  
Opp. to Countrywide Motion to Dismiss at 24, suggests that Countrywide had  
access to substantial liquidity at the time the statements were made—even if that

1        Though initial public offering markets are generally not efficient, see *In re*  
2 *Initial Public Offering Sec. Litig.*, 471 F.3d 24, 42-43 (2d Cir. 2006) (citing judicial  
3 discussions of the issue at post-pleading stages), the efficiency of a market for  
4 offerings—even private offerings—by a large, well established, closely watched,  
5 and frequently traded public company presents a closer question. SEC rules allow  
6 the offering price to vary with market demand because the offering price is not  
7 final until the effective date. See Countrywide, Form 8-K (May 22, 2007)  
8 (discussing the May 16, 2007 issuance and pricing of the Debentures and attaching  
9 the offering materials). Therefore, for largely the same reasons as those explained  
10 below in analyzing Argent’s aftermarket efficiency allegations, Argent has  
11 adequately pled its own reliance on the integrity of market price-setting for the  
12 Debentures’ offering.

13        Reliance—aftermarket purchases. Though Rule 9(b) requires enhanced  
14 reliance allegations, courts still cannot blur the line between a motion to dismiss  
15 and a motion for summary judgment. *Argent*, 2008 U.S. Dist. LEXIS 103148, at  
16 \*8. “A well-pleaded complaint may proceed even if it strikes a savvy judge that

17  
18 access was due, at least in part, to market misperceptions or Countrywide’s  
19 misrepresentations. See ¶ 43. This Court has never analyzed liquidity-related  
20 allegations in a Countrywide case, except in *Pappas* to note (1) that Countrywide’s  
21 ability to sell mortgage-backed securities into the secondary market was allegedly  
22 a primary source of its liquidity and therefore the secondary market’s appetite for  
23 such securities—particularly Countrywide’s mortgage-backed securities—was  
24 important to Countrywide’s business, 588 F. Supp. 2d at 1152; and (2) to reject the  
25 *Pappas*’ Defendants’ fact-intensive arguments about macroeconomic forces, which  
26 were inappropriate on a motion to dismiss. *Id.* at 1173-74.

27        Further, Argent’s continued purchases after some alleged corrective disclosures  
28 may tend to show that Argent was not relying on particular statements later  
revealed to be false, but instead was relying primarily on market pricing—perhaps  
combined with some independent research or analysis. These are fact questions  
inappropriate for consideration on a motion to dismiss. This observation is relevant  
to the present motions only insofar as it leads to an inference that Argent relied on  
the market rather than actually relying on any particular statements.

1 actual proof of those facts is improbable.” *Bell Atlantic Corp. v. Twombly*, 127  
2 U.S. 1955, 1965 (2007).

3 Argent adequately pleads that the Debentures’ aftermarket was efficient.  
4 Modern courts use a variety of factors to determine efficiency. *See Binder v.*  
5 *Gillespie*, 184 F.3d 1059, 1064-65 (9th Cir. 1999) (citing and discussing the factors  
6 from *Cammer v. Bloom*, 711 F. Supp. 1264, 1286-87 (D.N.J. 1989)), *as modified*  
7 *on denial of reh’g en banc* (July 26, 1999), *cert denied*, 120 S. Ct. 1158 (2000);  
8 *Zelman v. JDS Uniphase Corp.*, 376 F. Supp. 2d 956, 968-70 (N.D. Cal. 2005)  
9 (using the correlation between the common stock price of a company and the price  
10 of convertible debt instruments as a relevant factor in determining whether debt  
11 instruments’ market was efficient).

12 The most important factors pointing to efficiency in this case are: (1) an  
13 adequately pled correlation between the Debentures’ prices and Countrywide’s  
14 widely and publicly traded common stock,<sup>8</sup> TAC at 34; (2) sophisticated market  
15 makers for the Debentures, ¶ 66; (3) trading in the Debentures by sophisticated  
16 institutional investors and arbitrageurs, such as Argent; (4) the fact that  
17 Countrywide was a large, closely watched company that was qualified to use SEC  
18 Form S-3; and (5) the presence of electronic trading platforms that allegedly  
19 provided access to market pricing for the Debentures, see ¶¶ 80-81.

20 No single factor is dispositive on its own. But, taken together, these factors  
21 adequately plead efficiency in this case. *See Teamsters Local 445 Freight Div.*  
22 *Pension Fund v. Bombardier, Inc.*, 2006 WL 2161887, at \*12, 2006 U.S. Dist.  
23 LEXIS 52991, at \*56-58 (explaining that no single factor—such as a correlation  
24

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25 <sup>8</sup> The common stock is reasonably alleged to be highly efficient, quickly  
26 impounding new information. Correlation therefore suggests that the Debentures’  
27 prices impound new information efficiently, just as does the common stock. *See*  
28 *Stoneridge Inv. Partners, LLC v. Scientific Atlanta, Inc.*, 127 S. Ct. 761, 729  
(2008) (reiterating that an efficient market for the fraud on the market presumption  
is one where “public information is reflected in the market price of the security”).

1 between markets—answers the efficiency question, but rather that efficiency is  
2 evaluated under the totality of the circumstances).

3 The parties make much of the fact that the securities traded privately with  
4 the aid of the PORTAL market, an electronic system run by NASDAQ that is  
5 available only to qualified investors. ¶¶ 56-59. However, “[t]he important question  
6 is whether the [security] is traded in a market that is efficient—one that obtains  
7 material information about a company and accurately reflects that information in  
8 the price”—not merely “[w]here the [security] is traded.” *Binder v. Gillespie*, 184  
9 F.3d 1059, 1065 (9th Cir. 1999) (quoting *Hurley v. FDIC*, 719 F. Supp. 27, 33 (D.  
10 Mass. 1989)), *as modified on denial of reh’g en banc, cert denied*, 120 S. Ct. 1158  
11 (2000). Those courts that have addressed fraud on the market and the efficiency of  
12 markets involving electronic trading platforms—such as PORTAL—which are  
13 available only to sophisticated investors but not the general public, have done so  
14 after detailed inquiry at a stage where it is appropriate to look beyond the  
15 pleadings. *Camden Asset Mgmt, L.P. v. Sunbeam Corp.*, 2001 WL 34556527, at  
16 \*5-11, 2001 U.S. Dist. LEXIS 11022, at \*16-36 (S.D. Fla. July 3, 2001)  
17 (discussing PORTAL at class certification).

18 Fairly construing the TAC’s allegations, there is no reason to require Argent  
19 to plead additional facts on issues such as (1) whether the bid-ask spreads were  
20 sufficiently narrow for the market to be considered efficient enough for the fraud  
21 on the market presumption; (2) whether market makers’ bid-ask spreads or trading  
22 prices were close enough to one another to allow the inference that there was an  
23 impersonal and efficient market for the Debentures; (3) whether there was enough  
24 trading volume to infer efficiency; or (4) whether the correlation between the  
25 prices of the Debentures and Countrywide common stock was tight enough to infer  
26 that Debentures’ pricing impounds new information nearly as efficiently as the  
27 common stock price.

28 Defendants’ observation that the Debentures’ convertibility features may,

1 under some circumstances, break the alleged price link with common stock is well  
2 taken. Likewise, the Debentures' unique debt features may also affect their degree  
3 of correlation with common stock price movements and may influence a trader's  
4 decisions. Further, the Court takes seriously Defendants' arguments that Argent's  
5 trading strategy—especially with regard to the large positions taken late in the  
6 alleged class period—is still not clear. *See Argent*, 2008 U.S. Dist. LEXIS 103148,  
7 at \*6, \*12-14 (discussing arbitrage).

8 Indeed, there are many facts which may be proven, but which are not  
9 properly before the Court at this stage, that may rebut the fraud on the market  
10 presumption. Such facts, without limitation, (1) may have affected debt pricing  
11 differently than they affected equity, such as the common stock, or (2) may show  
12 that events, circumstances, information, beliefs, or strategies that are not yet  
13 properly or fully before this Court caused, in whole or in part, Argent's trading  
14 decisions. Some of these facts may go to elements other than reliance.

15 However, Argent may proceed, having adequately pled its own reliance on  
16 an allegedly efficient market.

17 The Court does not address any other reliance doctrines that Argent contends  
18 may be available.

19 State claims. Because the surviving federal claims comprise the same facts  
20 to which the state claims relate, the state claims may proceed at this time.

21 The Court notes that California does not have a fraud on the market doctrine,  
22 *Small v. Fritz Cos.*, 30 Cal. 4th 167, 180 (Cal. 2003), but expresses no opinion on  
23 any other state reliance doctrines that Argent contends may exist.

## 24 II.

### 25 CASE MANAGEMENT

26 Meet and confer. The parties are ordered to meet and confer regarding the  
27 next appropriate steps in this litigation. The parties shall meet and confer within 14  
28 days of this Order's filing date. They shall file a joint status report and proposed



1 schedule within 15 days of this Order's filing date.<sup>9</sup> The proposed schedule shall  
2 take into account the Court's prior directions to expedite the case.

3 During the meet and confer, the parties may bear in mind the following:

4 Parallel proceedings. The parties should consider (1) the schedule of the  
5 parallel *Luther* case in state court; (2) the schedule in the ERISA case pending  
6 before Judge Walter of this District—particularly in light of the trial date already  
7 set in that case, *Alvidres v. Countrywide*, 07-CV-5810-JFW, Sched. Order at 30  
8 (C.D. Cal. Sept. 22, 2008); and (3) harmonizing this case's schedule with the  
9 *Pappas* case. *Pappas*, 07-CV-5295-MRP, Notice of Meet and Confer (C.D. Cal.  
10 Jan. 12, 2009).

11 Fraud on the market. Argent has adequately pled its own reliance on an  
12 allegedly efficient market. This says nothing of Argent's ability to represent a  
13 class. But Argent has already begun making arguments about class representation.  
14 *See, e.g.*, Pl.'s Opp. to Countrywide's Mtn. to Dismiss at 31, 36. A motion for class  
15 certification is not before this Court. And, in any event, the Court has discretion  
16 regarding class certification's timing. Fed. R. Civ. Proc. 23(c)(1)(A); *Wright v.*  
17 *Schock*, 742 F.2d 541, 543-44 (9th Cir. 1984).

18 Argent correctly points out that institutional investors should not, by virtue  
19 of their being relatively well informed investors, be denied the fraud on the market  
20 presumption. But Defendants correctly suggest that rebutting the presumption is  
21 more likely when institutional investors undertake unique trading strategies. Class  
22 representation may be quite difficult in such circumstances.

23 In view of these observations, the parties should consider whether discovery  
24 targeted to Argent's decisions about trading the Debentures is an appropriate step  
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26 <sup>9</sup> Due to some recent confusion in the *Pappas* case, the Court clarifies: all dates  
27 shall be calculated by the date of an order's filing, not the date it is entered on the  
28 docket system. Weekends count; the electronic docket system enables counsel to  
file documents at any time, including weekends.

1 to take early in this case.

2       Damages. Argent has cited language from the *Pappas* order regarding  
3 Section 11 damages. Pl.'s Opp. to Countrywide's Mtn. to Dismiss at 37 n.49. This  
4 is not a Section 11 case, and the presumptive damages statute discussed in *Pappas*  
5 does not necessarily apply. This Court has made no statement on an appropriate  
6 damages measure in a case such as this. The Court does not now express any  
7 opinion on an appropriate damages measure. The Court does observe that damages  
8 on complicated instruments such as the Debentures here may present difficult  
9 issues, especially given the contingencies that affect the Debentures' convertibility  
10 and debt features. However, at this stage, the Court has not considered the  
11 implications, if any, of factors such as put rights, redemption rights, or tender  
12 offers.

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III.

CONCLUSION

All requests for judicial notice are GRANTED only to the extent that they request notice of documents filed with the SEC. All other requests for judicial notice are DENIED.

Countrywide's motion to strike the Nye affidavit is GRANTED.

The audio recording attached to McMurray's motion to dismiss is STRICKEN on the Court's own motion.

BofA's motion to dismiss is GRANTED on the ground that nothing before the Court adequately alleges or suggests that BofA has acquired the relevant Countrywide liabilities. The TAC's allegations as to BofA are DISMISSED without leave to amend.

Mozilo's motion to join Countrywide's motion to dismiss is GRANTED.

Countrywide's motion to dismiss is DENIED.

McMurray's motion to dismiss is DENIED.

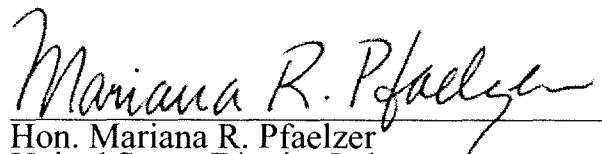
Sambol's motion to dismiss is DENIED.

Sieracki's motion to dismiss is DENIED.

All parties are ORDERED to meet and confer regarding the next appropriate steps in this litigation. The parties shall meet and confer within 14 days of this Order's filing date. The parties shall file a joint status report and proposed schedule within 15 days of this Order's filing date.

IT IS SO ORDERED.

DATED: March 19, 2009

  
Hon. Mariana R. Pfaelzer  
United States District Judge